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FILED
MAR 26 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1242

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

SUN MYUNG MOON and TAKERU KAMIYAMA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE FOR THE AMERICAN COALITION OF UNREGISTERED CHURCHES AND THE RELIGIOUS FREEDOM INTERNATIONAL IN SUPPORT OF PETITION FOR CERTIORARI

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Consent for filing this brief has been obtained from both parties. Their original letters have been filed with the Clerk of this Court pursuant to Rule 36.

INTEREST OF THE *AMICI*

The American Coalition of Unregistered Churches is a voluntary association of fundamentalist churches comprising approximately 5000 independent congregations; likewise, the Religious Freedom International is a volun-

tary association of holiness churches comprising approximately 2000 independent congregations. Therefore, both organizations are vitally interested in maintaining separation of church and state, believing that Christ is the head of the Church as to all matters.

Moreover, they believe that Christianity pervades the entire realm of human experience, and the scope of traditional Christian principles embraces education, the family, social outreach, youth, the elderly, and innumerable other activities which, if separated from their religious context, might well be considered "secular" activities.

Amici's current concern springs particularly from recent and highly controversial attempts by state government to regulate Christian education as a mere secular activity. The Supreme Court explicitly recognized that education is "an integral part of the religious mission" of certain churches in *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971); *see NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); and so it is for these *amici*.

SUMMARY OF ARGUMENT

If the Supreme Court does not hear this case, the precedent which will be left by the Second Circuit's decision in *United States v. Moon*, 718 F.2d 1210 (1983), will seriously limit and re-define the permissible ministries and activities of churches. If the prosecution and courts are allowed to ignore a church's sincerely held definition of its religion, then they will certainly not be bound to accept the church's definition of the nature and extent of its ministry. Many activities now viewed by churches as an integral part of their ministries will be susceptible to being artificially labelled as independent non-related activities if this precedent is left standing. Once these activities are separated out and branded as "secular" they are shorn of their sacrosanct character and become vul-

nerable to increased government regulation, intervention and taxation.

Amici fear that the Court of Appeals' holding in the instant case gives rise to precedent legalizing undue government intrusion in religious ministries. The Second Circuit ruled that "in this criminal proceeding, the jury was not bound to accept the Unification Church's definition of what constitutes a religious use or purpose." 718 F.2d at 1227. This contradicts fundamental First Amendment principles. If it becomes legitimate for the government and the courts to tangle themselves in consideration of the expenditures of a church, without due consideration and deference to that church's *bona fide* belief as to the "religiousness" of such expenditures and allocations of funds, *Lemon v. Kurtzman* will essentially be overruled. For besides embracing religious education with First Amendment protections as a religious ministry, *Lemon v. Kurtzman* also held that the government could not examine a school's records "to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the constitution forbids." 403 U.S. at 620.

It is this same sort of government evaluation as to what was a secular as opposed to a religious use of funds which *amici* finds so offensive in the instant case. If the principle of *Lemon v. Kurtzman* applies to church ministries, it certainly has an even more obvious application to the expenditures of the church itself. The central issue to be determined in the *Moon* case was whether the assets involved belonged to Moon personally, as the government claimed, or to the Unification Church, although held in trust by Moon, as the defense claimed. As the dissenting judge recognized, in regard to the way funds were spent, the jury was left free to decide that any given use of property was not religious, and thus that the property

was not church-owned, simply because the jury regarded the use as serving merely "business . . . or personal ends." The instructions given to the jury said that in order for a trust to exist, the assets had to be used "for church purposes" but then left it at that, permitting the jury to distinguish between church and personal uses on whatever basis it wished, without regard to the tenets or purposes of the Unification faith. This permitted the jury to disregard evidence that, from the religion's point of view, the uses in question were calculated to advance its cause.

The holding in the *Moon* case offends the Religion Clauses of our Constitution in at least two fundamental respects: First, in finding that the Religion Clauses did not apply to "federal criminal tax prosecutions," the Court of Appeals overlooked this Court's prior holdings in such landmark cases as *United States v. Ballard*, 322 U.S. 78 (1944), *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *United States v. Seeger*, 380 U.S. 163 (1975). All of these were *criminal* cases, and in each of them this Court established a constitutional duty to respect the defendant's own religious views, provided that they were sincerely held. The Court of Appeals' decision in the *Moon* case has far-reaching implications, given the reality today when practicing Christians have been criminally prosecuted and jailed in essence for what they sincerely believe to be their obligation to give their children a totally religious education. *Amici* fear that the decision in this case may seriously undercut the principles established in *Ballard*, *Yoder*, *Seeger* and other decisions.

Second, the Court of Appeals, by affirming the trial court's instructions and evidentiary rulings artificially separating religion out from the underlying events, seriously misinterpreted the separation of church and state mandated by the Constitution. The trial judge characterized the issue in the case as one of whether Reverend Moon could "simultaneously be a businessman and a religion".

T.5520.[1] Yet, it ignored this Court's holdings in such cases as *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Larson v. Valente*, 456 U.S. 228 (1982), which recognized the right of churches to sustain themselves through financial activities which might otherwise look to be solely secular business activities. Although the public or the prosecutors may have feelings about the business practices of churches, this does not make church investments any less legal or valid. Nor do the jury's own religious predilections make the defendant's beliefs any less sincere.

It is in these two respects that the Court of Appeals decision most directly impinges on *amici's* religious freedom in the field of education. If in this case, the activities and expenditures of a church, which it sincerely believes to be religious, may be improperly detached from the church as a whole, examined and henceforth regulated as mere secular activities, the same danger is posed for our Christian schools and those who administer them.

Even conceding the state police power over matters of health and safety, and even the government's responsibility to see that basic education takes place, the line must be drawn as to the permissible extent of government entanglement in religious affairs. *Lemon v. Kurtzman*, 403 U.S. at 602.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED IN ORDER TO CLARIFY THE ROLE OF THE RELIGION CLAUSES IN FEDERAL CRIMINAL TAX PROSECUTIONS

In this case the government brought a criminal prosecution against a minority religious leader under circumstances which would arguably initiate merely a taxpayer

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[1] Citations to trial transcripts will be to "T. ——"; citations to post-trial hearing transcripts will be to "S. ——."

interview or at most a civil suit. By simply labeling the proceedings "criminal" the Court of Appeals justified itself in its refusal to apply the Religion Clauses.

In the resolution of church property disputes, the courts are certainly bound to give effect to the intent of the donors, or take a "neutral principles of law approach", giving deference to the church's definition of religiousness, *Jones v. Wolf*, 443 U.S. 595 (1979). *See*, Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 Calif. L.R. 1378, *particularly* 1437-44 (1981). That the constitutional underpinnings of these decisions apply equally well to criminal prosecutions can be seen in the constitutional reasoning behind the church property dispute holdings: "To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide . . . the [appropriate] use of church property would violate the First Amendment in much the same manner as civil determinations of religious doctrine," *Maryland and Virginia Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring); "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976), *quoting Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969).

Undisputedly, the government has a legitimate interest in the collection of tax revenue, but "[f]orbidding church leadership to use contributed funds for a purpose authorized by the donors surely requires the presence of some important policy of overriding concern." Ellman, *supra*, at 1439. While whenever a criminal investigation is involved "the state's interest unquestionably is strong," *Surinach v. Pesquera de Busquets*, 604 F.2d at 80; *see Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940), Moon's holding of church funds in an account

in his own name and spending those funds on behalf of his church—a practice followed by other religious leaders and the common practice of which the judge recognized pretrial as undisputed, P. 99, 104—falls somewhat short of an act "inimical to the peace, good order and morals of society." 718 F.2d at 1227, *quoting Davis v. Beason*, 133 U.S. 333, 342 (1890). While defendants should not be allowed to be insulated from the court's analysis of their "church's activities as needed to determine whether those activities violated a statute," [2] 718 F.2d at 1227, the Constitution does require that those activities be viewed in their religious context.

Despite the government's interest in the enforcement of criminal laws, the courts were nonetheless required to consider the defendant's sincerely held religious views as this Court did, for instance, in the *Ballard*, *Yoder* and *Seeger* cases. The Court of Appeals should not have stopped its analysis by the mere labeling of the prosecution as a "criminal proceeding". The Court of Appeals erroneously upheld the trial judge's instructions to the jury which effectively stated that they needn't pay attention to whether the donors had a religious purpose in giving their money, nor to whether Moon acted in accordance with their wishes in spending the money. *Amici* urge that this

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[2] The Court of Appeals' recognition that it is the *church's* activities that are being questioned reflects an inconsistency in its opinion and detracts from its contention that this was simply a case of an individual's liability for tax reporting. 718 F.2d at 1227-28. While individuals should not be allowed to avoid liability by hiding behind the First Amendment, so, too, the government, once it grants tax exemption to *bona fide* religious organizations, cannot attempt to get around *that* status by charging the religious leaders with the income. The Unification Church was granted federal tax exempt status in 1963 and has received judicial recognition as a *bona fide* religious group. *See, e.g., Unification Church v. Immigration and Naturalization Service*, 547 F.Supp. 623 (D.D.C. 1982). "[B]y any historical analogy, philosophical analysis, or judicial precedent . . . [the Unification Church] must be regarded as a *bona fide* religion." *Id.* at 628.

disturbing and apparently novel rule be given full review by this Court.

Ignoring the petitioners' beliefs as to "religiousness" is as erroneous in the *Moon* case as it would have been in the *Ballard* case to tell the jurors to decide whether the content of the literature the Ballards sent through the mail was true, and if not, to convict them of mail fraud. In *Ballard*, this Court ruled that the determination of guilt or innocence had to be based on what the Ballards sincerely believed.

The Second Circuit's decision in the *Moon* case would seem to say that the jury in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), could have been told that it needn't worry that Mr. and Mrs. Yoder thought it was crucial to their religion to keep their children home from school; rather the jury could decide on any criteria it wished that it was not a good idea to keep the Yoder children home from school, and could therefore convict the parents for doing so.

Similarly, by instructing the jurors in the *Moon* case that the "religion . . . of the defendants is of no consequence whatsoever", T. 6538, and by failing to instruct them or give them any guidance as to how to make a legally sound determination as to church purposes, the court effectively overruled *United States v. Seeger*, 380 U.S. 163 (1975). The Supreme Court ruled in *Seeger*, the conscientious objector case, that if Seeger's beliefs were sincere and occupied a position that he believed to be religious, then the government and courts must respect them in the same way it did traditional religious beliefs. Applying the standard which was applied in the instant case would have allowed Mr. Seeger's jury to send him not simply to jail, but possibly to war, despite his sincerely held belief.

Clearly the Religion Clauses do apply to federal criminal prosecutions. The Court of Appeals offered no legitimate grounds for carving out an exception to this rule in the prosecution of Reverend Moon.

II. CERTIORARI SHOULD BE GRANTED TO REAFFIRM THE SANCTITY OF A CHURCH'S OWN DEFINITION OF ITS RELIGIOUS ACTIVITIES AND MINISTRIES

An issue squarely presented by the *Moon* case is whether the government can filter out the religious dimension of a church's efforts to survive and grow by making economic investments without "excessive government entanglement with religion." *Walz v. Tax Commisison*, 397 U.S. 664, 674 (1970). In the *Moon* case the jurors were prevented from hearing defense evidence "with respect to the relationship between church and business", T. 5254, and that the investments in question were made for religious purposes, T. 5618. In addition, the judge failed to properly explain the legal standard the jury should apply in determining "church purposes", a determination which he told them they would have to make in order to determine whether or not a trust existed. In the absence of appropriate instructions it is impossible to predict upon what basis the jury reached its verdict, nor whether they simply discounted expenditures of the funds in question as being "secular", despite the fact that the defendants believed them to be religious. This was all despite the well-settled principle in *Lemon v. Kurtzman*, 403 U.S. at 621-22, that it is constitutionally impermissible for a government body, be it the prosecution or the courts, "to determine which expenditures are religious and which are secular."

The question this case presents is whether the government can ignore a church's sincere definition of its own ministry. As the government openly declared, "we undertook to try Reverend Moon . . . like any ordinary person charged with tax fraud," S. 65, and the court confirmed that the trial proceeded on this basis when the judge acknowledged that Reverend Moon was "treated as anyone else would be without any consideration of his re-

ligious beliefs." S. 133. *See also*, S. 24, T. 2163, 6281, 6471-73. Perhaps in a misguided effort to show deference to the principle of the separation of church and state, the court imposed secular standards exactly where the *Ballard* line of cases established that deference should be given to religious beliefs.

By permitting the jury to superimpose its own standards, be they secular or eevn those of the religion of *their* own choosing, the government excessively entangled itself with the Unification religion and denied that Church and its members their right to free exercise. As education was held to be "an integral part of the religious mission", so, too, the "ability to make decisions concerning the recruitment, allocation and expenditure of their funds is intimately bound up in [the church's religious] mission . . . and thus is protected by the free exercise clause of the First Amendment." *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979).

As *amici* read the Court of Appeals' decision, its precedent will certainly have a chilling effect on the constitutionally sanctioned practice of almost all major religions of holding stock or other investments in properties or profit-making corporations for the benefit of the church, out of fear that such investments might trigger criminal investigations or the loss of tax exempt status and its accompanying tax-deductible donations. Moreover, of more immediate concern to this *amici*, the door has been shoved open for the government to impose secular standards and reject the church's own sincerely held belief in the "religiousness" of an activity or decision. This would hold true not only in the broad terms of the expenditure of church funds, but it might also be used to justify government intrusion without a compelling state interest—perhaps merely with the prelitigated label of "criminal"—in even the routine administration of church ministries, including religious schools.

CONCLUSION

As our society becomes more and more secularized, safeguards must be taken that we do not eradicate the protection of the First Amendment for those it was originally drafted and demanded to protect. When it comes to activities and decisions that a church views as integral to its mission, be it spending decisions or the education of its youth, the government should certainly not be allowed to knock those activities down from the status of "integral" to that of "secular" in one fell swoop. Although the free exercise of religion is "subordinate to the criminal laws of the country", 718 F.2d at 1227, *quoting Davis v. Beason*, 133 U.S. at 342-43, the factfinder's ultimate determination as to criminality must, in accordance with the Constitution and precedents set by this Court, at least consider the sincerely held religious beliefs of the defendant when those beliefs are relevant to the issues being tried. To separate out the various activities of a church in total disregard of the beliefs and practices of the religion carries the separation of church and state to an extreme that clearly violates the First Amendment.

The Court of Appeals' decision in *United States v. Moon* raises far-reaching implications for the sanctity of all religions and religious ministries. *Amici* therefore respectfully request that this Court take jurisdiction over the case by granting certiorari.

Respectfully submitted,

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March, 1984